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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/689,269	10/20/2003	Triveni P. Shukla	00030-001	2927

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EXAMINER
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DONOVAN, MAUREEN C

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 09/22/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/689,269

Applicant(s)

SHUKLA ET AL.

Examiner

Maureen C Donovan

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 20 October 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-6 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
1. Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over McGinley, US patent number 5 192 569 in view of Inglett, US patent number 5 766 662.

McGinley discloses food products containing an aqueous dispersion comprised of a dietary fiber gel, water and lipid. McGinley discloses the use of microcrystalline cellulose (see Column 4, lines 15-16), which is a source of dietary fiber and is a gel in water (see Column 3, lines 39-50), therefore is a dietary fiber gel. McGinley discloses the use of a lipid with the dietary fiber gel (see Column 6, lines 45-68). McGinley discloses adding the dietary fiber and lipid to water to form an aqueous dispersion (see Column 7, lines 59-63) and then adding that aqueous dispersion to a food product as a fat replacement (see Column 1, lines 25-30 and 36-37). The aqueous dispersion as

disclosed by McGinley comprises a dietary fiber gel, water and lipid; thus, it is the same as the emulsified liquid shortening composition, even though such term is not used in the reference. McGinley discloses that the solids contained within the dietary fiber gel represent 1-50% by weight of the overall food formulation (see Column 8, lines 5-20). McGinley discloses using the aqueous dispersion in vegetable fillings, which the Office interprets to be a composition of ground vegetables, which is interpreted to encompass vegetable-derived meat substitute.

McGinley does not disclose using the aqueous dispersion in processed meat.

Inglett teaches a dietary fiber gel as a reduced calorie/fat substitute for use in meats such as hamburger (see Column 5, lines 10-13 and Abstract, lines 1-8). Note that the Office interprets the reference to teach the use of a dietary fiber gel in all forms of meat, as it would be obvious to one of ordinary skill in the art that processed meat, hot dogs, sausage, pressed meat and ground meat are all encompassed by the teaching of "meat".

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the aqueous dispersion as disclosed by McGinley in a meat product as taught by Inglett since both are directed to dietary fiber gels as food fat substitutes and since using the high fiber gel in meat would reduce the caloric value of the meat product (see Inglett, Column 5, lines 7-8).

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the

unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1-6 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of copending Application No. 10/689267 in view of McGinley and Inglett.

Claims 1-6 of the instant application claim food comprising an emulsified liquid shortening composition comprising dietary fiber gel, water and lipid, wherein the emulsified liquid shortening composition comprising dietary fiber gel, water and lipid is added in a prorated amount such that solids contained within the dietary fiber gel represent 0.1 percent to 5.0 and 0.1 percent to 7.0 percent by weight of the overall food formulation and the emulsified liquid shortening composition comprising dietary fiber gel, water and lipid replaces an equal amount of fat used in an otherwise identical recipe of food that uses no emulsified liquid shortening compositions comprising dietary fiber gel, water and lipid. The claimed matter of claims 1-6 of the instant application can be found also claimed in Application No. 10/689267 (see Application No. 10/689267, claims 1-5). Application No. 10/689267 claims that the solids contained within the

dietary fiber gel represent 0.1 percent to 0.5 percent by weight of the overall food formulation, which is within the range as claimed in the instant application.

Application No. 10/689267 does not claim that the emulsified liquid shortening composition is used in processed meats or vegetable-derived meat substitutes.

Inglett teaches a dietary fiber gel as a reduced calorie/fat substitute for use in meats such as hamburger (see Column 5, lines 10-13 and Abstract, lines 1-8). Note that the Office interprets the reference to teach the use of a dietary fiber gel in all forms of meat, as it would be obvious to one of ordinary skill in the art that processed meat, hot dogs, sausage, pressed meat and ground meat are all encompassed by the teaching of "meat".

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the emulsified liquid shortening composition as claimed in Application No. 10/689267 in a meat product as taught by Inglett since both are directed to dietary fiber gels as food fat substitutes and since using the high fiber gel in meat would reduce the caloric value of the meat product (see Inglett, Column 5, lines 7-8).

McGinley teaches food products containing an aqueous dispersion comprised of a dietary fiber gel, water and lipid. McGinley teaches a using the aqueous dispersion in vegetable fillings, which the Office interprets to be a composition of ground vegetables, which is interpreted to encompass vegetable-derived meat substitute.

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the emulsified liquid shortening composition as claimed in Application No. 10/689267 in a vegetable product as taught by McGinley since both are directed to

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dietary fiber gels as food fat substitutes and since using the high fiber gel in a vegetable product would impart a fat-like mouth feel and consistency without the caloric value of fat (see McGinley, Abstract, lines 14-15).

This is a provisional obviousness-type double patenting rejection.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Baer et al, US patent number 5 011 701 discloses an aqueous dispersion comprising dietary fiber gel, water and lipid.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD



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